FIFTH SESSION

Saturday, April 26, 1913, 10 o'clock a.m.

The meeting was called to order by Mr. James Brown Scott.

Secretary SCOTT. Gentlemen, there are two subjects which you will find enumerated on the program, which remain to be discussed, and I am very happy to inform you that Professor Garner, who was unable to reach Washington last evening, is here this morning and will read his paper. After his paper, which is the leading paper on the subject discussed last night, is read, we will take up the regular morning program, and I shall ask Professor George Grafton Wilson if he will be good enough to preside.

[Professor George G. Wilson, a member of the Executive Council, thereupon took the chair.]

The CHAIRMAN. Professor Garner, whose paper was announced last evening, has the affirmative of the question "Has the United States the right to exclude from the use of the canal any class of foreign vessels, such as railway-owned vessels?"

HAS THE UNITED STATES THE RIGHT TO EXCLUDE FROM THE USE OF THE CANAL ANY CLASS OF FOREIGN VESSELS, SUCH AS RAILWAY-OWNED VESSELS?

ADDRESS OF MR. JAMES W. GARNER, *Professor of Political Science in the University of Illinois.*

Apparently two classes of foreign vessels are excluded by the terms of Section 11 of the Panama Canal Act from the use of the canal. This section contains several provisions, one of which reads as follows:

> From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock

ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. * * * In all such cases the order of said commission shall be final.

Another provision reads as follows:

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Anti-Trust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

The purpose of the first mentioned provision is well known. It was designed to preserve competition between the transcontinental railroads and steamship lines operating vessels between the Atlantic and Pacific coasts, by prohibiting such roads from acquiring the

ownership or control of competing water carriers and thus monopolizing the traffic between the eastern and western parts of the continent.[1]

There are seven transcontinental roads wholly within the territory of the United States (the Northern Pacific, the Southern Pacific, the Great Northern, The Union Pacific, the Missouri Pacific, the Milwaukee and St. Paul, and the Santa Fe), though in fact, only one of them, the Southern Pacific, at present has any interest in water carriers that would probably make use of the canal if they were not excluded. This road owns more than half of the stock in the Pacific Mail Steamship Company, which operates vessels between San Francisco and Panama and has a fleet of vessels on the Atlantic engaged in traffic between New York and certain Gulf ports,[2] and it was assumed by Congress that the company would put on a line of steamers through the canal as soon as it should be opened for traffic.

An examination of the terms of the Panama Act will show that its purpose is not to exclude from the canal *all* railroad-owned ships. In the first place, the prohibition applies only to vessels engaged in competitive traffic with the railroad which owns or controls the said vessels. In the second place, the Act does not apply to vessels owned by railroads which are not subject to the Interstate Commerce Act of the United States. This brings us to the question whether any foreign railroad-owned vessels come within the purview of the law, and if so, whether the exclusion of such vessels from the use of the canal is a violation of the Hay-Pauncefote Treaty. As I have said, the Panama Canal Act by its express terms applies only to railroads that are subject to the Interstate Commerce Act. The first section of the Interstate Commerce Act declares, among other things, that

---

[1]The Committee on Interstate and Foreign Commerce in its report of March 16, 1912, on the Panama Canal Act, thus stated the purpose of the provision: "The apprehension of railroad-owned vessels driving competition from the canal may or may not be exaggerated, but it is certain that the evil, which is only anticipated there, already exists in the coastwise trade on both coasts, as well as on our lakes and rivers. The evil is prevalent, recognized, and complained of. The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition. In answering demands for the exclusion of railroad-owned ships from the canal, which in this bill or any other would simply amount to an amendment of the Act to regulate commerce, the committee thinks it wise, just, and opportune to broaden the amendment so as to serve the higher, wider, more pressing, and more necessary purpose of excluding the railroads from operating vessels in competition with their tracks anywhere in the coastwise trade generally or in the lakes and rivers." See also the *Congressional Record*, 62nd Congress, 2nd Session, pp. 1896, 10556, 10557.

[2]Hearings before the Committee on Interstate and Foreign Commerce, H. R. Doc. No. 680, 62nd Cong., 2nd Sess., p. 505.

its provisions shall apply to any common carrier engaged in the transportation of persons or property by railroad from any place in the United States to an adjacent foreign country or from any place in the United States through a foreign country to any other place in the United States. Since no railroads can be subject to the Interstate Commerce Act, which are not wholly or partially within the United States, it follows from physical necessity that railroad-owned ships of no foreign country can be affected by Section 11 unless such country is geographically contiguous to the United States. There are but two countries so situated, namely, Mexico and Canada. No European, Asiatic or South American railroad can be affected because no such railroads are or can be subject to the American Interstate Commerce Act. There are, however, two Canadian railroads which are subject to the Interstate Commerce Act, namely, the Canadian Pacific, which owns or controls by lease more than six thousand miles of lines in the United States, and the Grand Trunk Railroad, which has some fifteen hundred miles of lines in the United States. The former of these roads is transcontinental and is the owner of lines of steamships both in the Atlantic and in the Pacific Oceans. Vessels owned by this road, if operated through the canal, would, like those of the Southern Pacific, be engaged in competitive traffic with the owning road, and are therefore excluded from the canal by the Panama Act. That this road is subject to the Interstate Commerce Act with respect to its lines in the United States, whenever it is engaged in interstate traffic, there can be no doubt. It regularly complies with the terms of the Act in respect to the filing of schedules, the making of reports, etc., and it is often a party to cases before the Interstate Commerce Commission. The terms of the Panama Canal Act make no distinction between domestic and foreign railroad-owned ships, and the debates on the bill indicated that it was not the intention of Congress to make any such distinction, but to exclude from the canal the ships of any and all roads, American and Canadian alike, which are subject to the Interstate Commerce Act, and whose traffic is competitive with the railroads which own them. Representative Knowland stated in the course of the discussion of the bill that Section 11, in his opinion, would debar Canadian railroad-owned ships,[3] and this seems to have been assumed by all who participated

[3] *Congressional Record,* May 16, 1912, 62nd Cong., 2nd Sess., p. 6594; also May 18, p. 6752.

in the debates. Senator Newlands expressed satisfaction that this interpretation of the bill removed the objection that the Act, while prohibiting domestic railroad-owned ships from using the canal, might leave open the door to the Canadian railroads to establish a steamship service through the canal, either by acquiring the ownership of vessels now owned by certain transcontinental railroads or by establishing new lines of its own.[4] For the reason that the Act was understood to apply to the Canadian railroads and would therefore be a violation of the Hay-Pauncefote Treaty, Representative Stevens of Minnesota, a member of the House Committee on Interstate and Foreign Commerce, declined to concur in the report of the committee.[5] It seems clear, therefore, that Section 11 was assumed to apply to Canadian railroads which are subject to the Interstate Commerce Act, and that there was no intention of making any distinction between them and domestic railroads, in respect to the exclusion of their ships from the canal.

Nevertheless, the British Government in its protest against the Panama Canal Act interpreted Section 11 as having no application to ships owned by foreign railroads. On this point Sir Edward Grey said in his dispatch of November 14, 1912, to the British Ambassador at Washington:

> His Majesty's Government do not read this section of the Act as applying to, or affecting, British ships, and they therefore do not feel justified in making any observations upon it. They assume that it applies only to vessels flying the flag of the United States, and that it is aimed at practices which concern only the internal trade of the United States. If this view is mistaken and the provisions are intended to apply under any circumstances to British ships, they must reserve their right to examine the matter further and to raise such contentions as may seem justified.

---

[4] *Congressional Record,* 62nd Cong., 2nd Sess., p. 10574.

[5] See his remarks in the *Congressional Record,* 62nd Cong., 2nd Sess., pp. 6922, *et seq.* Representative Adamson, Chairman of the House Committee on Interstate and Foreign Commerce, informs me that he drafted this provision of Section 11 and that he intended it to apply to all railroad-owned vessels engaged in competitive traffic, whether they were foreign or domestic. Representative Esch, another member of the committee, also informs me that the prohibition as interpreted by him applies to all Canadian roads which are subject to the Interstate Commerce Act the same as to domestic roads and that this was the understanding of the majority of the committee.

In case the Government of the United States interprets the Act to apply to Canadian railroads subject to the Interstate Commerce Act, as Congress seems to have assumed that it would, the British Government will doubtless file a protest against Section 11.

The other provision of Section 11, which excludes from the canal vessels engaged in the coastwise or foreign trade, if they are owned, chartered, operated or controlled by any person or company doing business in violation of the Act of 1890 to protect trade and commerce against unlawful restraints and monopolies, commonly known as the Sherman Anti-Trust Act, as well as the Act of 1894, and all other Acts amending or supplementing either of these Acts, is obviously directed against certain alleged steamship trusts, just as the provision already explained is directed against the expected transcontinental railway monopoly of competing water traffic through the canal.[6] That the great majority of ships likely to be excluded from the canal by this provision are foreign-owned, results from the fact that over ninety per cent of the foreign trade of the United States is now carried in foreign ships. Moreover, by no possible construction of the terms of Section 11 can it be held to apply only to American ships. The language is plain and the debates on the bill show that it was aimed primarily against foreign, rather than domestic, shipping combinations and pools.[7] It seems to be assumed that it would be no violation of our commercial treaties to exclude such ships from entering American ports, and at the last Congress there was a bill before the House prohibiting all vessels, whether American or foreign, adjudged guilty by the courts of violating the Sherman Anti-Trust Act, from entering any American port or clearing therefrom, until the court should find that the combination of which they were members had been dissolved. This bill had the approval of the Attorney General, who, it is asserted, entertained no doubt of its constitutionality.[8] Furthermore the Department of Justice seems to assume that the courts already have such power, and two suits in equity are now pending in the United States District Court for the

---

[6]The House Committee on Merchant Marine and Fisheries asserted, in a report made a year ago, that over 90 per cent of the foreign trade of the United States was carried by foreign ships "that belong to rings, pools and combinations, and that between the steamship lines composing these combinations, there was absolutely no competition." Report No. 632, 62nd Congress, 2nd Session.

[7]*Congressional Record,* 62nd Cong., 2nd Session, pp. 7561-7563.

[8]*Ibid.,* p. 7563.

Southern District of New York, for the dissolution of the so-called Atlantic and Asiatic shipping pools composed almost entirely of foreign steamship lines.[9] The petition asks, among other things, that the defendants be forbidden from entering or clearing any of their ships or vessels at any American port of entry, so long as they shall continue to maintain the unlawful combinations and conspiracies with which they are charged. Whether the court has the power to issue a decree excluding them from entering American ports, there is a difference of opinion which need not be discussed here, but there can be no doubt that if convicted of violating the Sherman Act, they will be excluded by the terms of the Panama Canal Act from using the canal, and the exclusion will not be merely theoretical, for all the seven lines which are defendants in the Asiatic shipping pool case are engaged in trade between the port of New York and the Orient and will therefore presumably use the canal unless debarred.

Having shown that Section 11 of the Panama Canal Act makes no distinction between domestic and foreign vessels, we may now inquire whether the exclusion of the two classes of foreign ships against which this section is directed is a violation of the Hay-Pauncefote Treaty. Article III of the treaty contains the following stipulation:

> The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise.

The language of this provision is broad in scope and makes no exceptions in respect to particular vessels which may have occasion to use the canal. The canal is declared to be *free and open* to all, subject only to the condition that they must observe those rules of the Suez Convention which are embodied in Article III of the treaty as the basis of the neutralization of the canal. Strictly construed, the language of the above quoted treaty stipulation undoubtedly confers a right

---

[9]One of these cases is that of the United States versus the Prince Line, the Lamport and Holt Line, and the Hamburg-American Lines; the other is that of the United States versus the American-Asiatic, the Anglo-American Oil Line, the United States and China-Japan Line, and American-Oriental Line, the Barber and Dodwell Line, the American-Manchurian Line and the Isthmian Line. All these are foreign corporations except two.

upon every foreign merchant vessel and every war vessel, without exception, to use the canal, so long as it observes the rules adopted as the basis of neutralization. It follows logically, that the canal may be closed to any vessel which violates these rules, but only such vessels, since the exclusion of no others is contemplated by the terms of the treaty, either expressly or by implication. Now the Panama Canal Act, as stated above, undertakes to close the canal to two classes of foreign ships which are not excluded by the terms of the treaty. These are: (1) Certain railroad-owned vessels, and (2) all trust-owned or controlled vessels engaged in the domestic or foreign carrying trade of the United States.

Is it possible to reconcile the exclusion of these two classes of foreign ships with the principles of freedom and equality guaranteed by the treaty to the vessels of all nations? First, it might be argued that since the United States is the owner of the canal, it is, to a certain extent, in the position of a grantor in respect to the privileges conceded to the ships of other nations to use the canal. One of the recognized rules governing the interpretation of treaties by which one party grants to the citizens or subjects of another the right to travel or reside in its territory, engage in business, enter its ports, or use its harbors, rivers and canals for purposes of traffic, is that such rights shall be strictly construed and that they must be exercised subject to the local laws, and, although granted in general and apparently absolute terms, they may, in fact, be limited by reasonable restrictions imposed for the protection of the public health, morals, and good order of the inhabitants. Treaties of commerce and navigation not infrequently contain express reservations of this kind, a good example being the Convention of Commerce and Navigation between the United States and Great Britain of 1815.[10] Similarly, the Treaty of Washington of 1871, Article XXVI, by which

[10]Article 1 of this treaty reads as follows: "There shall be between the territories of the United States of America, and all the territories of His Britannick Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but *subject always to the laws and statutes of the two countries, respectively.*"

Great Britain granted to the citizens of the United States the right to navigate the St. Lawrence River for purposes of commerce, contained the reservation that such freedom of navigation should be subject to any laws and regulations of Great Britain or the Dominion of Canada, not inconsistent with the privilege of free navigation, and the right granted by the United States to British subjects by the same treaty to navigate the Yukon, Porcupine and Stikine Rivers, was subjected to the same conditions. Likewise, the right of British subjects to navigate Lake Michigan was granted by Article XXVIII subject to the same conditions. It is true that the Hay-Pauncefote Treaty contains no reservation of this kind, and it might therefore be argued that the privilege of using the Panama Canal is absolute and subject to no restrictive local legislation enacted in pursuance of the established public policy of the country owning the canal or for any other purpose whatsoever. But to this it could be replied, that the liberty granted by treaty to the citizens or subjects of foreign states to navigate the waterways of the country to which they belong is never understood to be absolute and unconditional, even though the language of the treaty is general in character, any more than the liberty of speech, of press or assembly allowed by municipal law is understood to be absolute and unlimited. Hence, it may be argued that it was not necessary to reserve expressly in the treaty the right to close the canal to particular ships adjudged guilty of violating the laws of the United States, enacted in furtherance of the well-established policy of the country to preserve competition in respect to traffic and to prevent monopoly, provided there is no discrimination or inequality of treatment.

The United States is a party to many commercial treaties by which the privilege is granted in general terms to foreign vessels to enter the ports and harbors of the country and to navigate its public waters, but it has never been contended that such privileges are in fact subject to no reasonable restrictions. On the contrary, it has always been understood that such privileges must be exercised subject to the local laws, and it is generally admitted that even public vessels, which have a right to enter the ports of any country independently of treaty stipulations, may be excluded for violation of the local laws in regard to quarantine, anchorage, pilotage, harbor police, etc.

The right of a government to limit by reasonable regulations treaty privileges granted in general terms, has long been defended by Great

Britain in the case of the right of American citizens to participate in the North Atlantic fisheries. By the convention of 1818 between the United States and Great Britain, it was agreed that the inhabitants of the United States should have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish on certain parts of the coasts of Newfoundland and other possessions of Great Britain, no mention being made in the treaty of any restrictions, except as to the territorial limits within which the privilege should be exercised. Furthermore, by the Treaty of Washington of 1871 (Article XVIII) it was provided that the inhabitants of the United States should have liberty in common with the subjects of Great Britain to take fish of every kind, except shell fish, upon certain coasts of British North America, provided they did not interfere with the rights of private property or with British fishermen in the peaceable enjoyment of any part of the said coasts in their occupancy for the same purpose. No other restrictions were referred to in the treaty. Notwithstanding this general grant of the right to take fish in certain British waters, the legislature of Newfoundland proceeded to enact laws prescribing a closed season during which fishing was prohibited on the treaty coast, and prescribing the methods and implements to be used in taking fish. The United States argued that the fishery rights conceded by the treaty were absolute and subject to no restraints imposed by the Government of Newfoundland without its consent.

The dispute was submitted to the Permanent Court of Arbitration at The Hague in 1910. In the argument before the court, the British Government put forward the following proposition:

> As to the general principle which governs the construction of treaties such as this, it is submitted that the mere grant of a right or liberty to subjects of one state to do certain acts in the territory of another state, does not itself confer any exemption from the jurisdiction of the state in which those acts are done. There is hardly a nation in the world which is not bound by treaty to permit the subjects of some other Power to have access to its territories for some purposes—a liberty to trade is a common instance. But it has never been contended that grants such as these carry with them any immunity from the laws of the country which makes them, or that aliens trading under treaty liberties are not subject to the municipal laws which regulate the trade of the country. Grants of this kind are made on the understanding that they must be exercised subject to such laws and

> regulations as apply to the subjects of the State which makes them. No State can be presumed to have been willing to put aliens in a better position than its own subjects, or to have renounced the right to regulate trade within its own territories, in the absence of express words to that effect, and the same argument applies equally to other liberties, including such a liberty as that which is now under discussion.[11]

The court decided that Great Britain had the right to make such regulations without the consent of the United States, provided they did not unnecessarily interfere with the fishery itself, and were not so framed as to give an unfair advantage to one of the parties over the other and were not inconsistent with the obligation to execute the treaty in good faith.[12]

But is the exclusion of railroad- and trust-owned vessels from the Panama Canal at all analogous to the restrictions imposed by the Government of Newfoundland on the exercise of the fishery privilege? These latter restrictions were justified by the British Government on the ground that they were a reasonable and necessary means for the protection and preservation of the fisheries and were also in the interest of public order and good morals, and it was upon these grounds that the right of the Newfoundland Government to impose them was affirmed by the Hague Court. The grounds upon which the United States proposes to close the canal to railroad-owned and trust-controlled ships have no relation to the protection, police or orderly use of the canal or the maintenance of public order or good morals in the Canal Zone. In the case of railroad-owned vessels, the exclusion is defended as a reasonable measure for preserving to the people of the United States the benefits of competition between

---

[11]Proceedings in the North Atlantic Fisheries Arbitration, Vol. 4, pp. 36-37, Senate Doc. No. 870, 61st Cong., 3rd Sess. Speaking of the American contention, Mr. W. E. Hall remarks (*International Law*, 5th ed., p. 339): "In other words, it was contended that the simple grant to foreign subjects of the right to enjoy certain national property in common with the subjects of the state carries with it by implication an entire surrender, in so far as the property in question is concerned, of one of the highest rights of sovereignty, viz., the right of legislation. That the American Government should have put forward the claim is scarcely intelligible. There can be no question that no more could be demanded than that American citizens should not be subjected to laws or regulations, either affecting them alone, or enacted for the purpose of putting them at a disadvantage."

[12]Proceedings in the North Atlantic Coast Fisheries Arbitration, Vol. 1, p. 85. See also an article by Robert Lansing, AMERICAN JOURNAL OF INTERNATIONAL LAW, January, 1911, pp. 1, *et seq.*

the transcontinental railroads and steamship lines operating through the canal, by prohibiting such roads from owning or acquiring control of competing water carriers and thereby obtaining a monopoly of the transcontinental carrying trade. In the case of vessels engaged in the foreign trade, found guilty of violating the anti-trust laws, exclusion from the canal is purely and simply a penalty imposed for such violations and, like the exclusion of railroad-owned ships, has no relation to the protection of the canal or the preservation of the local public order or morals. The closing of the canal to both classes of ships can be defended, if at all, only as a measure for promoting the well-settled public policy of the United States in respect to monopolies and combinations in restraint of trade. But it might be contended, and doubtless will be contended, by the British Government that considerations of what a nation may be pleased to denominate its established public policy in respect to combinations in restraint of trade, afford no justification for imposing restrictions upon rights of navigation granted by treaty, especially when such restrictions amount to a denial of the privilege. Since every nation determines for itself its own public policies, if it were allowable to subject the enjoyment of a treaty right to such restrictions and conditions as the grantor nation might judge appropriate for the maintenance of such policies, and to prescribe as a penalty for the violation of general laws enacted in pursuance thereof the withdrawal of the privilege granted, manifestly the restrictions and penalties might be multiplied without limit and the treaty right reduced to nothing.

It may be seriously doubted, therefore, whether the exclusion of the two classes of foreign vessels from the canal can be reconciled with the treaty. It is one thing to regulate the exercise of a treaty right in respect to the navigation of domestic waterways, by prescribing appropriate and reasonable police regulations for the protection and orderly use of the waterway which is the subject of the right; it is quite another thing to prescribe as a penalty for the violation of laws enacted in furtherance of the general public policy of the grantor nation—laws in which the element of police control is lacking—the withdrawal of a plainly granted treaty right. The exclusion of ships in this case is not for violation of laws enacted for the protection or police of the canal, but for violation of other laws which have no relation to the exercise of the privilege granted by the treaty.

It might be contended that inasmuch as Section 11 of the Panama

Act does not discriminate against any nation, or the citizens or subjects thereof, but treats all alike, it does not violate the treaty. If it excluded railroad-owned and trust-controlled vessels belonging to certain foreign nations, or to all foreign nations, and at the same time permitted those of the United States to use the canal, Great Britain might justly claim that the equal treatment provision of the treaty was violated. But there is no discrimination here in favor of the United States as there is alleged to be in Section 5 of the Panama Act, which exempts American coastwise vessels from the payment of tolls and requires it of foreign vessels. No question of preferential treatment of American ships is involved in Section 11, since the canal is closed equally to all American and foreign railroad-owned and trust-controlled ships alike. Moreover, it might be argued that if the United States, while excluding its own ships for violating the Sherman Act, is bound to open the canal to foreign vessels found guilty of violating the same law, the effect will be to accord, not *equal* treatment to foreign vessels, which is all the treaty requires, but *preferential* treatment. But this argument rests upon the assumption that equality of treatment in respect to the use of the canal is all that the treaty guarantees. In fact, it guarantees more than that. It guarantees that the canal shall be *free and open* to the vessels of commerce and of war of all nations. To close the canal, therefore, to certain classes of foreign vessels, even though there is no discrimination or inequality of treatment, would be a violation of the treaty. Strict compliance with its provisions requires freedom of use as well as equality of treatment in respect to tolls, one quite as much as the other.

The question of the right of the United States under the treaty to exclude foreign vessels from the use of the canal was little discussed in the debates on the Panama Canal bill. The point was raised by Representative Cannon in the House on May 18, 1912, but was not dwelt upon at length. In the course of his remarks, Mr. Cannon stated that it would not be possible under the treaty to exclude vessels owned by Canadian railroads, but his contention was denied by Representative Knowland.[13] Mr. Stevens of Minnesota opposed the bill mainly for the reason that Section 11, as he understood it, was a violation of the treaty.[14] But most of those who participated in the

[13] *Congressional Record*, 62nd Cong., 2nd Sess., p. 6752.
[14] *Ibid.*, p. 6922.

debates apparently assumed otherwise. The question therefore is an open one—it is purely and simply a question of treaty interpretation, and, unless the provisions of the Canal Act which have given rise to the dispute are modified or repealed, the obligation of the United States to accept the proposal of the British Government to submit the controversy to arbitration is one which the Government of the United States cannot honorably refuse.

The CHAIRMAN. Before proceeding with the discussion of this paper and the last paper of last evening, we will proceed with the program of the morning. All of the speakers are present, and, therefore, it would seem that we should go immediately forward.

The first paper on the program for this morning is on the question "Is it necessary in international law that injury actually be suffered before a justiciable action arises?", which is to be read by Mr. Thomas Raeburn White, of the Philadelphia Bar.

IS IT NECESSARY IN INTERNATIONAL LAW THAT INJURY ACTUALLY BE SUFFERED BEFORE A JUSTICIABLE ACTION ARISES?

ADDRESS OF MR. THOMAS RAEBURN WHITE, *of the Philadelphia Bar.*

The expression "justiciable action" carries with it the idea of compulsion. An action is a proceeding in a court of justice. It implies that the plaintiff can compel the defendant to answer and obey the order of the court.

An action, however, in this sense can scarcely be said to exist in international law; there is no recognized court; there is no method of commencing an action by summoning the defendant; there can be no compulsion to answer. By "action" in international law, therefore, we mean something slightly different—the right of one nation to demand of another that a dispute be submitted to arbitration. The word "justiciable" presupposes a controversy capable of being, and proper to be, so submitted.

But how can one nation be said ever to have the right to *demand* that a controversy be submitted to arbitration? Clearly no demand can be enforced. But an action or right of action may be said to arise where the circumstances are such that the demand for arbitration would be supported by the united opinion of the civilized world, and